IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. Case No.: 4:18-cr-00076-MW-CAS

SCOTT CHARLES MADDOX,

Defendant.
_____/

**DEFENDANT MADDOX'S FIRST MOTION TO DISMISS COUNTS 1 AND 8-35 OR, IN THE ALTERNATIVE, STRIKE PORTIONS OF THE INDICTMENT**

The Defendant, Scott Maddox, by and through the undersigned counsel, moves this Honorable Court to dismiss certain counts of the Indictment or, in the alternative, strike certain material as surplusage. Specifically, Mr. Maddox avers that Counts 1 and 8-35 of the Indictment do not allege cognizable claims for "honest services fraud," "extortion," or "Travel Act" violations. Therefore, the Defendant contends that these particular counts should be dismissed, or the relevant paragraphs be stricken, under Fed. R. Crim. P. 7(b), Fed. R. Crim. P. 12 and the Due Process Clause of the United States Constitution.

## MEMORANDUM OF LAW

### I. Factual Allegations

The Indictment alleges that the two Defendants engaged in a racketeering conspiracy to engage in "honest services" fraud, Hobbs Act violations, Travel Act violations, False Statements, Bank Fraud and Federal Income Tax offenses. At this time, Mr. Maddox is not moving to dismiss the False Statement, Bank Fraud, or Tax offenses. Instead, this motion is directed to the constitutional and pleading deficiencies in the allegations related to "honest services" fraud, Hobbs Act claims, Travel Act claims and the conspiracy.

The Indictment alleges that six companies, described as Company A through Company F, were involved in distinct events, each of which allegedly constituted "honest services" fraud or extortion. Although Mr. Maddox challenges all of the allegations made on these claims with respect to these "companies," each factual situation is unique. Some of these events are pled with more specificity than others. Therefore, although Mr. Maddox moves to dismiss Counts 1 and 8-35 in their entirety, each episode must be separately analyzed to determine if the allegations for each situation meet the Due Process requirements for these types of allegations. If any of the allegations related to a particular company are deficient to state a crime, then, at a minimum, those counts and the associated factual allegations for such counts should be stricken from the Indictment. Mr. Maddox recognizes that

he must accept the allegations as true for purposes of a motion to dismiss. Thus, while the factual allegations are disputed in fact, they are described below as pled in the Indictment.

**Background**

The Indictment generally alleges that Defendants Maddox and Carter-Smith were involved in entities known as Governance, Inc. (Governance) and Governance Services, LLC (Governance Services). According to Paragraph 1 of the Indictment, however, it is agreed that Mr. Maddox sold his interest in Governance, Inc., to Ms. Carter-Smith as of March 12, 2010, while he was not serving on the City Commission. Mr. Maddox was never a member of Governance Services, LLC.

As alleged, Mr. Maddox was not on the City Commission for much of the relevant time period of the Indictment. He was on the City Commission from 1993 through 2003, but no unlawful activity is alleged during that time frame. He then re-joined the Commission in 2012. During that timeframe, Mr. Maddox was not an owner, shareholder, member, or affiliate of Governance or Governance Services.

As noted above, the Indictment contains numerous allegations relating to entities known as Company A through Company F. These allegations are described below:

**Company A**

The Indictment contains allegations of honest services fraud in paragraphs 49-58 with respect to "Company A." Company A is alleged to have hired Governance at a time when Mr. Maddox was not on the City Commission. Company A was doing business with the City prior to Mr. Maddox re-joining the Commission. It is alleged that Mr. Maddox failed to disclose to the City that he had represented Company A in the past. Yet, there is no allegation that Mr. Maddox received anything of value in a *quid pro quo* exchange for any "official act." Company A was included on a list of ten firms whose contracts were extended by the City Commission. However, there is no allegation of a *quid pro quo* payment in exchange for any vote or official act. There is also no allegation of any kickback from Company A. Company A stopped using Governance nearly four years prior to the end of the alleged conspiracy.

**Company B**

Next, the Indictment alleges in Paragraphs 59-69 that Company B engaged Governance almost five years after Mr. Maddox had sold his interest in Governance, Inc., to Ms. Carter-Smith. Paragraph 62 includes a vague allegation that Ms. Carter-Smith solicited payments for Governance, which she owned, in exchange for Mr. Maddox's vote "on the ordinance and related issues." There is no allegation of any contemporaneous "official act" made in direct exchange for such

payment. Instead, it is alleged that, on March 25, 2015, the Commission simply voted unanimously to delay a vote on an ordinance. According to Paragraph 67, it was several months later in July, when the Commission again considered an amendment to an ordinance, which was approved. The Indictment does not allege that the vote in July was the result of a direct exchange for any payment. Nothing in the Indictment suggests any kickback of any City money.

**Company C**

Paragraphs 70-77 allege that Company C had an agreement with Governance in 2006, more than six years before Mr. Maddox re-joined the City Commission. The Indictment alleges a long history of this Company engaging Governance on an "as needed" basis prior to Mr. Maddox re-joining the City Commission. Company C already had a seven-year contract with the City well before Mr. Maddox re-joined the Commission. Paragraph 71 alleges that the City Commission voted to extend this company's contract with the City for an additional five years, again before Mr. Maddox re-joined the Commission. There is no "*quid pro quo*" alleged with respect to any particular payment in exchange for any particular official act. There is an allegation that Mr. Maddox's relationship with Company C was not disclosed. There is an allegation that Mr. Maddox became involved in helping this constituent reduce (but not avoid) a fine imposed by the City, but no allegation that any payment or "*quid*" was made in exchange for

any official action or "*quo*." Per the Indictment, Mr. Maddox referred the matter of the fine to the City Manager.[1]

**Company D - Paragraph 78-86**

Paragraphs 78-86 allege that Company D also used Governance. Company D also began its relationship with Governance while Mr. Maddox was not on the City Commission. Again without any allegation of a "*quid pro quo*," there is an allegation in Paragraph 81 that Mr. Maddox voted against "amendments to a City administrative policy." The policy is not identified or described with any particularity. There is no indication that Company D asked Mr. Maddox to do anything relating to this unspecified City policy. The remainder of the allegations involve the extension of contracts for "nine firms" including Company D, which was already "prequalified" to do such work. There is no allegation of any payment made in a *quid pro quo* exchange for any vote or any other official act.

**Company E**

Paragraphs 87-94 involve Company E. Company E also began its relationship with Governance while Mr. Maddox was not on the City Commission. While he was on the commission, Mr. Maddox was asked by Company E about "additional assistance" with "City officials." No specificity is provided on these allegations and there is certainly no specific "official act" alleged. There is a vague

[1] Per the City Charter, Part 1, Subpart A, Section 10, a City Commissioner has no power to give orders to, nor make demands of, the City Manager. In fact, the Indictment does not allege that Mr. Maddox made any attempt to order the City Manager on the resolution of this constituent's issue.

allegation that payments were in "exchange" for an agreement to act "as opportunities arose," but no allegation of an actual "*quid pro quo*" payment in exchange for a specific official act. Instead, the only specific allegations relate to a constituent who had issues with a fence and reported those issues to Mr. Maddox. Mr. Maddox in turn contacted the City Manager, who apparently resolved the issue.[2]

**Person E**

Paragraphs 95-100 involve Person E. Person E is alleged to have declined to hire Governance. However, his project was fully funded by the CRA. Thus, there was no *quid*. The CRA funded the project for $1.6 million without any payment in exchange for any official act. There is no allegation in the Indictment that Mr. Maddox performed any official act. It is admitted in Paragraph 100 that Mr. Maddox did not even attend the CRA meeting in which the project was funded.

**Company F**

Paragraphs 101-116 involve a fictitious organization operated by undercover federal agents. This fictitious organization was created by the government to entice public officials into committing crimes. No specific project is ever identified, nor is any official act identified or alleged. The trip to Las Vegas is not alleged to be a part of any *quid pro quo* exchange, kickback or any other federal crime. There is

[2] Again, see footnote 1. Mr. Maddox is not alleged to have violated the Charter by ordering the City Manager to resolve this issue in any particular manner.

no allegation that the trip was a violation of any bribery statute. Moreover, there is no allegation of any official action taken on any project, vote, or anything else at the behest of the fictitious undercover operation.

## II. Legal Analysis

### A. Honest Services Fraud

Counts 15-26 of the Indictment in this case allege that Mr. Maddox violated the "honest services" statute, which purports to make it a crime to "deprive another of the intangible right of honest services." 18 U.S.C. §1346. Mr. Maddox contends that the "honest services" statute, as applied to the allegations in this Indictment, is void-for-vagueness. Moreover, Count 1 must also fall, as it alleges, in part, a conspiracy to commit honest services fraud.

The void-for-vagueness doctrine derives from the protections of the Fifth Amendment's Due Process Clause. The doctrine embodies the idea that "a statute which either forbids or requires the doing of an act in terms *so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application* violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (emphasis added). The doctrine has two principle aims: (1) to ensure fair notice as to what constitutes illicit behavior; and (2) to prevent the injustice of capricious enforcement.

The doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see, e.g., United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002). The doctrine enshrines the notion that "fair warning should be given to the world in language that *the common world will understand*, of what the law intends to do if a certain line is passed" and the idea that a law that does "not provide sufficient minimal standards to guide law enforcement officers" does not adequately protect against arbitrary enforcement. *See United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *Chicago v. Morales*, 527 U.S. 41, 72 (1992) (Breyer, J., concurring) (quotation omitted). *See also Johnson v. United States*, 135 S.Ct. 2551 (2015) ("conduct that presents a serious potential risk of physical injury" is void for vagueness). The question of whether a criminal statute provides sufficient notice to meet due process requirements is a question of law, not fact. *United States v. Garber*, 607 F.2d 92, 110 (5th Cir. 1979).

**1. Supreme Court Rejection of "Honest Services" Theory in *McNally***

The "honest services" statute, 18 U.S.C. §1346, has been the subject of thorough criticism by the United States Supreme Court. This criticism has been justified, considering the inherent ambiguity as to what constitutes an "intangible

right of honest services." Prior to the enactment of this statute, the United States Supreme Court held in *McNally v. United States*, 107 S.Ct. 2875 (1987) that federal fraud statutes could not be used to criminalize behavior on the ambiguous standard of an intangible right to honest services. The *McNally* Court held that any attempt to criminalize honest services fraud on the basis of the general federal fraud statutes was unconstitutional. The *McNally* Court also warned that allowing such a prosecution on vague standards would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 107 S.Ct. at 2882.

**2. Section 1346 Enacted but *Skilling* Strictly Limits its Application**

After *McNally*, Congress enacted 18 U.S.C. §1346 in order to try to salvage the theory of "honest services fraud." Nevertheless, the revised statute does nothing to disentangle or even provide guidelines as to "standards" for determining what is "good government for local and state officials." Therefore, the statute continues to suffer from federalism concerns. In this case, Mr. Maddox asserts that the counts alleging honest services should be stricken in their entirety on this general ground, or alternatively on the more narrow grounds, as applied, which are discussed below.

After *McNally* and the enactment of Section 1346, the Supreme Court again rejected the honest services fraud theory of criminal liability in *Skilling v. United*

*States*, 130 S.Ct. 2896 (2010). In *Skilling*, the Supreme Court determined that the attempt in that case to criminalize the deprivation of an "intangible right of honest services" was still unconstitutional in large measure. Specifically, the *Skilling* opinion, authored by Justice Ginsberg, held that it would be unconstitutional to apply such a vague standard to the defendant in that case. *Id.* at 2931.

The *Skilling* Court suggested that the statute should rarely be applied, if at all. In following the principle of judicial restraint, however, the Court construed the statute narrowly to apply only to "bribes and kickbacks." *Skilling*, 130 S.Ct. at 2933; *see also Black v. United States*, 130 S.Ct. 2963, 2968 (2010) ("We decided in *Skilling* that § 1346, properly confined, criminalizes only schemes to defraud that involve bribes or kickbacks.") Thus, any extension of the honest services theory beyond this limited core would warrant a void-for-vagueness challenge under the Constitution.

In *Skilling*, Justice Scalia wrote a concurring opinion, in which two other justices joined, concluding that not even bribery or kickback "honest services" cases could survive the vagueness challenge. *Skilling*, at 2935. The concurring opinion and the majority agreed that the conviction should be stricken. However, the concurrence would have not only struck the *Skilling* conviction, but also any other application of the "honest services" statute. The concurrence wrote that while the majority "strikes a pose of judicial humility in proclaiming that our task is 'not

to destroy the Act . . . but to construe it,' *ante*, at 2930 (internal quotations omitted). *But in transforming the prohibition of 'honest services fraud' into a prohibition of 'bribery and kickbacks' it is wielding a power we long ago abjured: the power to define federal crimes." Skilling*, at 2935 (emphasis added).

Thus, the concurring opinion would have rendered the statute impotent even as to bribery and kickbacks. The concurrence commented on the wide range of standards utilized in the pre-*McNally* era, which attempted to define the "intangible right" to "honest services" based on such vague notions as "moral uprightness" or "fair play." *Skilling*, at 2937. The concurrence noted that the "possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal . . .". *Skilling*, at 2938. Therefore, the concurrence observed that although it would also have reversed the conviction, it would have gone farther in concluding that "§1346 provides 'no ascertainable standard' for the conduct it condemns." *Skilling*, at 2940.

In any event, the majority in *Skilling* and the concurring opinion, all agreed that the defendant, Mr. Skilling, had not engaged in taking bribes or kickbacks, so the statute was unconstitutional as applied to Mr. Skilling. Setting aside the compelling concurrence for a moment, it is also clear that the majority went on to specifically exclude large categories of conduct from the scope of Section 1346. In

fact, the Court excluded from the scope of the statute some of the very theories alleged in this case.

For example, in this case, there are allegations of self-dealing and failure to disclose conflicts of interest.[3] The theme of the Indictment is that Mr. Maddox failed to disclose an alleged interest in a Governance entity and prior client relationships. Even if we accept these allegations as true for purposes of this motion, however, *Skilling* concluded that self-dealing and conflicts of interest are not appropriate targets of an honest services prosecution. Instead, the Court rejected the government's argument that the statute covered "self-dealing" or claims of "conflicts of interest." *Skilling*, 130 S.Ct. at 2932. "Holding that honest-services fraud does not encompass conduct more wide ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government's less constrained construction absent Congress' clear instruction otherwise." *Id.* at 2933. The Court was explicit in rejecting the government's contention that conflicts of interest cases were within the constitutional scope of the honest services statutes: "In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of §1346 must exclude this amorphous category of cases." *Id.* at 2932.

[3] See Indictment at Paragraphs 54, 73, 85.

The *Skilling* Court expressed reservations as to the constitutionality of the honest services statute in any form. Nevertheless, the Court drew on principles of judicial restraint to not strike the statute entirely, although the concurrence would have taken such an approach. The Court, in the majority opinion, noted the principle that it should try to construe, rather than condemn, the statute if possible. The Court looked for any reasonable construction that could save the statute and held that it must be confined to allegations of kickbacks or bribes. *Id.* at 2929. The Court found no legitimate construction of the "honest services" statute as applied to the facts of the *Skilling* case.

**3. *McDonnell* Court Limits Definition of "Official Act"**

In 2016, the Supreme Court again narrowed the application of the honest services statute. In *McDonnell v. United States*, 136 S.Ct. 2355 (2016), the Court reviewed the honest services statute (and the Hobbs Act) for vagueness. The decision was yet another landmark decision, narrowing the statute and raising questions as to prior precedents. The *McDonnell* Court took the analysis beyond where it had been in *Skilling*, requiring not only a strict *quid pro quo* exchange, but also constricting the definition for the required element of an "official act."

The *McDonnell* Court held that many acts by public officials, such as arranging meetings or contacting other government officials regarding a constituent's needs, were not sufficient to constitute an "official act" for purposes

of the honest services statute. *McDonnell*, 136 S.Ct. at 2365-66. "[C]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns." *Id.* at 2372. Later cases further hold that "taking a public position" on an issue is not an official act. *United States v. Silver*, 864 F.3d 102, 122 (2d Cir. 2017).

The "official act" requirement is strict after *McDonnell*. The Supreme Court described this requirement as follows: "the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official. Second, the Government must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *McDonnell*, 136 S.Ct. at 2368.

In this case, many of the Defendant's alleged acts, such as failing to disclose a relationship or referring constituents to the City Manager, do not meet the test for official action. The Supreme Court likened the level of official act to be more formal, like the filing of a lawsuit. The *McDonnell* Court held: "The last four words in that list—'cause,' 'suit,' 'proceeding,' and 'controversy'—connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative

determination." *Id.* Informal action is insufficient. Most certainly, informal action that is not given in direct exchange as a part of *quid pro quo* bribery is insufficient.

The *McDonnell* Court also raised the same "federalism" concerns that were raised in *McNally*. In *McNally*, the Court noted that the application of the "honest services" statute to conduct by state officials was problematic. An expansive interpretation would not only create Due Process concerns, but also intrude into the "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 136 S.Ct. at 2373. In this case, there is no substantive federal bribery charge because the matter relates to a City Commissioner. Thus, the federal charge again raises the problem of federal intrusion into state and local government.

**4. The Government's Incorporation of the Florida Bribery Statute**

The government will likely argue that it has met its pleading burden under *Skilling* by using the word "bribery" in scattered parts of this Indictment. On two occasions in the Indictment, the "bribery" is tied to section 838.015, Florida Statutes. In other places, including the "honest services" counts, there is no statutory reference or any definition at all to support the bald legal claim of "bribery." The Indictment, therefore, not only fails to address the federalism concern raised by the Supreme Court, but it also raises the prospect of having fifty or more interpretations of "honest services" fraud based on the myriad of state

statutes on bribery on top of the multiple federal statutes defining bribery. If each of the state law bribery statutes, along with the various federal statutes on bribery, can form the basis for federal "honest services" allegations, the application of the federal "honest services" standards will vary from state to state, and from statute to statute, raising both federalism issues and Equal Protection concerns.

Here, the Indictment generally summarizes allegations of state law "bribery," but only in those conclusory paragraphs where the government is trying to check the box to show that all elements have been pled. The "bribery" reference in the conclusory paragraphs on "honest services" fails to identify any particular bribery statute. These conclusory allegations are also never matched up with the specific factual allegations for each "Company" in the Indictment. This leaves the Defendants in the dark as to the particular bribery statute allegedly applicable to their conduct.

In terms of the proof required for a Section 1346 prosecution based on bribery, the *Skilling* Court invoked a far more exacting standard than the standards of Section 838.015, Florida Statutes. The Court required proof to the standards of the federal bribery statute, that is, "18 U.S.C. §201(b)." *Id.* at 2933. Although it is not charged in this case, Section 201(b) and cases construing that statute have very strict requirements for proof of a "*quid pro quo*" transaction in order to sustain a

federal bribery allegation. *United States v. Sun-Diamond Growers of California*, 119 S.Ct. 1402, 1406 (1999).

In *Sun-Diamond*, Justice Scalia writing for the majority, concluded that "for bribery there must be a *quid pro quo* - a specific intent to give or receive something of value in exchange for an official act." *Id.* Thus, it does *not* rise to the level of bribery even if one gives gifts or money with the hope that the recipient will use its governmental power or influence in the donor's favor. *Sun-Diamond*, 119 S.Ct. at 1407. For example, if a donor gives to a public official hoping to create a "reservoir of goodwill" that might impact future acts, that is not enough to constitute bribery. *Sun-Diamond*, 119 S.Ct. at 1406.

Thus, in this case, payments to Ms. Carter-Smith's Governance entity with the hope that they might generate goodwill on an "as needed basis" (Paragraph 70) or "as opportunities arose" (Paragraph 25, 73, 80, 89) are insufficient to allege bribery. As the Supreme Court had held, a "statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Sun-Diamond*, 119 S.Ct. at 1410.

This narrow construction, as crafted by the Supreme Court, is necessary to avoid the chilling of First Amendment rights to support a candidate. This narrow construction is important so that public servants can serve constituents without fear of indictment. For these practical reasons and also to meet the constitutional

requirements of Due Process, the strict limitation of "honest services" indictments to *quid pro quo* bribery and kickbacks is now well established in the case law.

This heightened *quid pro quo* requirement had its origins in *McCormick v. United States*, 500 U.S. 257 (1991), in the context of the Hobbs Act, in which the Court held:

> [T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

500 U.S. at 272. As held in *McCormick*, and later clarified by the Eleventh Circuit in *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994), the requirement of proof of a *quid pro quo* promise to perform a specific official act applies whether one is talking about campaign contributions or any other type of payment.

Here, the government has not charged any substantive count of bribery in the Indictment. The word "bribery" is only used in conclusory allegations within the honest services, Hobbs Act and Travel Act counts. No bribery or *quid pro quo* is alleged in any of the factual allegations. The words "*quid pro quo*" do not appear in this Indictment. In "honest services" Counts 15-26 (at paragraph 2 of the summary allegations for those counts), the government summarily avers that the right to honest services has been deprived by "bribery" without identifying any federal or

state statute, much less the required statutory elements, which must include a specific *quid pro quo* transaction for each count. In the Travel Act and racketeering counts, the government employs a reference to a state bribery statute, section 838.015, Florida Statutes. Again, this is alleged without tying any factual allegations to any specific acts of bribery or *quid pro quo* transactions.

Notably, section 838.015, as it existed for the majority of the relevant time period, required the government to prove that one acted "corruptly."[4] This is another element that is not pled in this Indictment, notwithstanding the statute's requirements during the relevant time frame. The term "corruptly" under the relevant version of the state statute has been construed by Florida courts to require the same "*quid pro quo*" requirement that the government seems intent on avoiding. In *State v. Flansbaum-Talabisco*, 121 So. 3d 568 (Fla. 4th DCA 2013), the Court held that an "explicit *quid pro quo*" is required to prove a bribery charge under section 838.015.[5]

The government's incorporation of the state statute generates additional confusion beyond the application of *Skilling* and *McDonnell*. By failing to specify which version of section 838.015 is implicated, after its amendment in 2016, the Indictment leaves the accused to guess as to whether an element of "corruptness" is required or whether the current version of the statute controls.

[4] Laws of Florida, Ch 2016-151.
[5] There is also a question as to that statute's constitutionality. *See State v. DeLeo*, 356 So.2d 306, 308 (Fla. 1978) (unconstitutional with respect to element of "corrupt" intent).

Moreover, the Indictment's incorporation of the state bribery charge impermissibly lessens the burden for the government in violation of *McDonnell*. Under the statute prior to amendment in Ch. 2016-151, Laws of Florida, the term "corruptly" was simply defined in former Section 838.014(4) as "acting knowingly and dishonestly for a wrongful purpose." This does not come close to the strict standards required for conviction under *quid pro quo* bribery as stated in *Skilling* and *McDonnell*.

The language of section 838.015, even in its current form, effectively resurrects all of the vagueness problems that the Supreme Court laid to rest in *McDonnell*. The state statute foregoes any reliance on the "*quid pro quo*" or "official act" strict standards, and instead casts the widest possible net. The statute, as incorporated into this Indictment, goes well beyond the narrow requirements of the Supreme Court by stating that there does not have to be an "official act," but just something "within the official discretion" of the public servant, or something in violation of a public duty. This is a far cry from the formal action required under *McDonnell*.

The Florida statute, as incorporated into the Indictment, unfairly expands both the definition of the *quid* and the *quo*, requiring "any pecuniary *or other benefit not authorized by law* with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public

servant represents as being, *within the official discretion* of a public servant, in violation of a public duty, or in performance of a public duty." §838.015, Fla. Stat. (2018) (emphasis added). In other words, after all the limiting work that the Supreme Court has done in *Skilling* and *McDonnell* to narrowly construe the statute to meet Due Process standards, the government has chosen in this Indictment to incorporate a statute not so restricted.

Instead of requiring the *quid* of giving something "of value," the government's charge would reduce the requirement to some "other benefit not authorized by law" under the Florida statute.[6] Instead of requiring the *quo* to be an "official act" consistent with the demanding standards of *McDonnell*, the government's charge would dilute the requirement to some "act or omission which the person believes to be, or the public servant represents as being within the *official discretion* of a public servant, in violation of a public duty, or in performance of a public duty." This eviscerates *Skilling* and *McDonnell*, and directly implicates the fear expressed by the concurrence in *Skilling*, warning that the "possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal . . .". *Skilling*, at 2938. Thus, the Indictment's incorporation of Section 838.015, Florida Statutes, and its vague references to public duty and official

[6] Under Florida's statutes banning gifts to state employees, the government could charge a "violation of a public duty" by the act of accepting a bottle of water from a private person.

discretion completely fail to meet the Due Process requirements expressed under *Skilling* and *McDonnell*.

**B. Racketeering and Hobbs Act**

Count 1 of the Indictment is a sweeping allegation of a racketeering conspiracy, which spans from bank fraud (not in any way related to public service) to extortion, honest services fraud, and "multiple" unspecified acts of "bribery" under "Florida State Statute 838.015." In addition, Counts 8-14 relate to alleged Hobbs Act violations. These counts should be stricken on the same basic rationale as outlined above for the "honest services" counts.

**1. Fear of Economic Harm (Company A only - Count 8)**

In terms of the Hobbs Act counts, many of the entities identified by letter, such as Company A, had relationships with Governance before Mr. Maddox re-joined the Commission in 2012. Thus, there was no public power brought to bear to induce these payments to Governance. Only Company A is alleged to have experienced a "fear of economic harm." The allegations offered to support Count 8 are at Paragraphs 49-58 of the Indictment, but they do not sufficiently plead extortionate behavior. Company A did not start paying the alleged Enterprise because of any threat of economic harm. Instead, such payments commenced five years before Mr. Maddox re-joined the Commission. Therefore, such payments were not tied to any threat of economic harm from a public official. In fact, such

payments ceased while Mr. Maddox was a commissioner over three years before the alleged conspiracy ended. The Indictment essentially acknowledges this problem at Paragraph 53 by relying on the subjective belief of Company A that it might face economic harm, rather than any allegations of true threats.

**2. Remaining Extortion Counts 9-14**

Both Count 8 and the remaining "extortion" counts (9-14) also fail to meet the *Skilling/McDonnell* criteria. In *McDonnell*, the Supreme Court applied the same constitutional analysis to both the Hobbs Act and the honest services allegations. As to both theories, the *McDonnell* Court found the convictions to be deficient because of the lack of proof of any "official act."

In this case, both the Hobbs Act violations and the honest services fraud require proof of a *quid pro quo* exchange, with the necessary allegation that an official act within the *McDonnell* definition was exchanged directly for a thing of value. These essential elements are not alleged in this Indictment, and the alleged facts would be insufficient to support such a claim even if a *quid pro quo* exchange had been summarily alleged.[7]

**C. Travel Act (Counts 27-35)**

Counts 27-35 allege violations of the Travel Act. All of these counts refer to the "unlawful activity" as bribery under section 838.015, Florida Statutes. These

[7] Again, as noted above in reference to the honest services claims, the racketeering Count 1 must also fail to the extent it alleges Hobbs Act as a basis for the alleged racketeering conspiracy.

counts must also fall for the reasons specified above. In addition, however, they must fall because there is no allegation that either Defendant acted "corruptly." The Florida Legislature deleted the "corruptly" element from that statute, effective October 1, 2016, but such requirement existed for at least the timeframe of Counts 27-32. Laws of Florida, Ch 2016-151. Thus, these counts fail to plead the "corruptly" element; they fail to allege a *quid pro quo*; and they fail to allege an official act under the standards of *McDonnell*.

**D. Additional Surplusage under Rule 7(b)**

The Indictment is also flawed by its inclusion of numerous, non-criminal matters, which serve no other purpose than to unfairly taint the Defendants and confuse the fact finder. For example, at paragraphs 5 and 6 of the Indictment, the Indictment baldly declares that there were "conflicts of interest" in unspecified votes. Such conflicts of interest are not crimes, nor do they support a claim under the honest services statute after *Skilling*.

Similarly, paragraphs 7 and 14 refer to comments to the Ethics Commission, and a suggestion of a transgression in ethics rules, including an alleged false statement to the commission. These acts are not within the scope of any federal criminal statute, and would only serve to confuse a juror into believing that a violation of an ethics rule is a federal crime. In the event that the relevant counts

pertaining to such surplusage are not dismissed, these allegations should be stricken from the Indictment.

Similarly, paragraph 9 of the Indictment refers to an alleged false statement in a deposition "involving his residency and eligibility" for office. This alleged false statement is never alleged to be a crime, nor is the issue of residency or eligibility relevant to any of the charged offenses. Thus, such allegations only create confusion and smear the accused. As such, they should be stricken as unduly prejudicial surplusage. Paragraph 12 adds another layer of false choices to the factfinder, as well, by referring to a "fiduciary duty" owed by the Defendant, even though the breach of a fiduciary duty is not the equivalent of any federal crime. The Indictment is rife with such irrelevant and unduly prejudicial material, which does nothing to establish whether bribes were made or kickbacks received.

As noted above, the trip to Las Vegas (see e.g., paragraph 114) is also pure surplusage with no reference to any bribe or kickback. In fact, it is precisely the type of conduct that was deemed insufficient to constitute an offense in *McDonnell*. In that case, a flight was also provided to the defendants along with various expensive gifts worth over $175,000. *McDonnell*, 136 S.Ct. at 2364. Yet, the Supreme Court determined that these gifts and payments were not exchanged for any official act. Similarly, in this case, there is no "official act" that is alleged to have been provided in exchange for this trip.

Given that there are no allegations of kickbacks anywhere in the Indictment, it is apparent that the case should be limited to a *quid pro quo* bribery theory only. Yet, the Indictment fails to allege the *quid pro quo* or official act standards set forth in *Skilling* and *McDonnell*. Moreover, the Indictment is littered with references to conduct that is plainly insufficient under the standards of the Supreme Court. As such, those counts of the Indictment should be dismissed.

WHEREFORE, the Defendant respectfully requests that this Court dismiss Counts 1 and 8-35 of the Indictment on the grounds raised herein or, in the alternative, strike those allegations relating to companies that are not alleged to have engaged in *quid pro quo* bribery and also strike other unduly prejudicial material that has no connection to acts of *quid pro quo* bribery.

Respectfully submitted,

/s/ Stephen S. Dobson, III
STEPHEN S. DOBSON, III
Florida Bar No.: 0779008
Primary Email: sdobson@bakerdonelson.com
Secondary Email: jwarmack@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
Monroe-Park Tower
101 North Monroe Street, Suite 925
Tallahassee, Florida 32301
Telephone: (850) 425-7500
*Counsel for Defendant,*
*Scott Charles Maddox*

## LOCAL RULE 7.1(F) CERTIFICATE

I HEREBY CERTIFY that the above memorandum complies with the word limit in N.D. Fla. Loc. R. 7.1(F) because this memorandum contains 6,260 words, excluding those parts that are exempted by the rule.

/s/ Stephen S. Dobson, III
STEPHEN S. DOBSON, III

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished electronically via CM/ECF this 22nd day of February, 2019, to:

Stephen M. Kunz, Esquire
Assistant U.S. Attorney
Office of the U.S. Attorney
111 North Adams Street, 4th Floor
Tallahassee, Florida 32301
Stephen.Kunz@usdoj.gov

Peter M. Nothstein, Esquire
U.S. Trial Attorney
U.S. Department of Justice
Public Integrity Section,
Criminal Division
1400 New York Avenue, NW
Suite 1200
Washington, DC 20005
peter.nothstein@usdoj.gov

Simon J. Cataldo, Esquire
U.S. Trial Attorney
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue, Suite 12000
Washington, DC 20005
Simon.Cataldo@usdoj.gov

Stephen G. Webster, Esquire
Law Offices of Stephen G. Webster, LLC
1615 Village Square Boulevard, Suite 5
Tallahassee, Florida 32309
sw@swebsterlaw.net
*Counsel for Defendant, Janice Paige Carter-Smith*

/s/ Stephen S. Dobson, III
Attorney